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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 457

EDDIE J. VIATOR, ET AL.,

Petitioners,

vs.

R. C. EDWINS, SHERIFF, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners.

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Petitioners,

vs.

R. C. EDWINS, SHERIFF, ET AL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Eddie J. Viator, J. J. Viator, J. A. Viator, C. C. Meyers, and O. Meyers, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Respondents, R. C. Edwins, Sheriff of Harrison County, Mississippi, State Tax Commission of Mississippi, A. H. Stone, Chairman, and J. E. Davis, Excise Commissioner, are attempting to collect from Eddie J. Viator, taxpayer, and the sureties on his certiorari bond, additional sales tax for the years 1937 and 1938, alleged to have been made by the chairman of the State Tax Commission under the pur-

ported authority of Section 8, Chapter 119, Laws of 1934, as amended by Section 6, Chapter 113, Laws of 1938, "from the best information available," by reason of the fact that the records kept by taxpayer were not adequate to determine the tax for which he was theretofore liable to the State of Mississippi (R. 79-80).[1] Registered letter demanding the said additional sales tax was received by taxpayer, but copies of returns and assessments were not attached, whereupon he petitioned for hearing before the commissioner, stating that said assessments were incorrect, that he did not owe said additional sales tax, denied jurisdiction of the commissioner to make said additional sales tax assessments (R. 40-46), claiming and stating he kept adequate records and preserved invoices for a period of two years, and requested said commissioner to investigate the matter fully before proceeding further, pursuant to the proviso contained in said Section (6) which is in the following language:

"Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall be petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section."

Taxpayer filed Motion to Quash the assessments because the returns and assessments were not attached, and for other grounds. The Motion to Quash was overruled. The commissioner failed to investigate the matter fully, said he would not investigate it fully or at all. Taxpayer testified before the Commission that he made returns showing all sales tax due the State of Mississippi, that he paid such tax, and did not owe any additional sales tax or any sales tax.

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[1] References are to pages of the Certified Transcript of the Record. The Record has as yet not been printed.

Taxpayer questioned the Field Representatives of the Commission at the hearing. They stated they made the additional assessments against the taxpayer "purposely high to take care of whatever they might be able to find", and made said additional assessments against taxpayer "by comparison with the business of other retail grocers in Gulfport, Mississippi, for the year 1939" (R. 40, 2, 3, 4, 5-46). The Commission refused taxpayer copies of the returns and assessments, and said they would introduce nothing in evidence. They refused to examine taxpayer's books, did not point out wherein they were inadequate and in what manner and in what number he failed to preserve invoices for two years. Nothing was done and no evidence was offered or introduced. However, the taxing authorities offered no other evidence, whatever, in rebuttal of the taxpayer's denial of any indebtedness and the taxing authoritie's final decision was rendered wholly upon the arbitrary conclusions of the Field Representatives aforesaid (R. 42, 3, 4, 5, 6).

Following the hearing before said commissioner, taxpayer appealed to the entire commission, reaffirming his position that the commissioner was without jurisdiction, and that taxpayer did not owe said additional sales tax. With consent of taxpayer, this appeal was heard by the Excise Commissioner (Sec. 1, Chapter 150, Laws of 1938). The Excise Commissioner refused taxpayer's request for subpoenas for witnesses, failed to introduce evidence, failed and refused to permit taxpayer to cross-examine witnesses against him, and made no record of any of the proceedings. At the conclusion of the hearing before the Excise Commission, he, the Excise Commissioner, failed and refused to make a report in writing setting forth a review of the cause and the essential facts of the matter. (Sec. 1, Chapter 150, Laws of 1938) (R. 44-45). Taxpayer's further appeal was then heard by the entire commission, as

shown by Exhibits "B" and "C" to Bill of Complaint (R. 73-78), but his objections went for naught and he was again denied request for subpoenas for witnesses, not confronted with the witnesses against him, nor permitted to offer his books as evidence of their adequacy, the commissioner was not required by the Commission to investigate the matter fully, and the Excise Commissioner not required to introduce evidence, books, records, or other pertinent information, depositions, and report in writing setting forth a review of the cause and the essential facts of the matter (Sec. 1, Chapter 150, Laws of 1938). Instead, the Excise Commissioner wrote the State Tax Commission a "letter" in which he said (R. 79):

"After a full investigation of all evidence and matters presented by the taxpayer, it was the opinion of the Excise Commissioner, and concurred in by the District Supervisor, the Field Auditor and the Attorney for the Commission that the additional tax should remain as assessed."

Jurisdictional facts are not set forth in the "Orders" entered against taxpayer (R. 70-78).

Following entry of final order by the State Tax Commission on the "letter" of the Excise Commissioner, quoted above, taxpayer filed petition for certiorari in the Circuit Court of Hinds County, Mississippi, which affirmed the tax but reduced the penalties from 25% to 15%.

Taxpayer then appealed to the Supreme Court of Mississippi, again pointing out the lack of jurisdiction, and contended the statutes of the State, as construed and applied by the Commissioner, the Excise Commission and the State Tax Commission were unconstitutional, null and void, and violated the 14th Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi. He contended that Orders of Quasi-judicial commissions and bodies must be supported

by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi.

The State court affirmed the assessment and held that whether there was evidence before the State Tax Commission upon which to base the additional assessments was not before the Circuit Court of Hinds County and not before the Supreme Court of Mississippi, because on certiorari the court could only consider errors of law arising or appearing on the face of the record. Notwithstanding, the Supreme Court of Mississippi held:

"• • • The taxpayer was given an opportunity both by the chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based."

The court said:

"The order of the State Tax Commission being simply one approving the assessment made by its chairman, it was not necessary for it to again set forth the facts on which the assessment was made."

In disposing of taxpayer's attack upon the jurisdiction of the chairman and the Excise Commissioner, denying their jurisdiction to make additional assessments against him without affirmatively showing he failed to maintain adequate records and preserve invoices for two years, the State court said:

"The right and duty of the Commission to make an additional assessment or return of the taxpayer's sales in addition to that returned by him, is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records, in Sec-

tion 6 of the statute, is to permit the Commissioner, when the taxpayer's records are inadequate, to determine the correctness of the return made by him 'from the best information available.' "

The State court attempts to dispose of appellant's attack on the former judgment, sought to be enjoined in this appeal case, by holding that the demurrer did not admit the allegations of the Bill as to the irregularity of the former proceeding, and as to the invalidity of the judgment, which the State Court says are mere conclusions of law.

The State court goes on to say:

"The instant proceedings therefore constitutes an attempt to show what might have been shown in the former case. The conditions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment."

In the first appeal case (*Viator* v. *States Tax Commission, et al.*), the State court held it could not consider the lack of evidence to sustain the assessments. When the facts of the matter are brought before the State court by Bill for Injunction, it holds the decision in the first appeal case is the law of this case and res judicata.

Taxpayer then appealed to this court and his appeal was denied for want of jurisdiction. Treating the papers as an application for certiorari under Section 237 (c), Judicial Code, certiorari was denied. (316 U. S. 644). Petition for rehearing was also denied. (316 U. S. 711).

This present appeal is from an adverse decision of the Supreme Court of Mississippi, affirming the decree of the Chancery Court of Harrison County, Mississippi, sustaining demurrer to Bill of Complaint to enjoin the collection of the tax and the execution of the judgment of Hinds

County, Mississippi. (R. 4-68). The facts alleged in the Bill of Complaint are admitted by demurrer. (R. 100-102). The Supreme Court of Mississippi affirmed, holding that the decision in the first appeal case, reported in 193 Miss. 266, 5 So. (2d) 487, is the law of the case and res judicata (R. 166-167).

Appellants contend that the state statutes, as construed and applied against them, are unconstitutional, deny them due process of law and the equal protection of the law, and violate the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi.

Petitioners say they were proceeded against without compulsory process for witnesses in their behalf, without opportunity to know the state of case against them, without copies of the returns and assessments mentioned in the registered letter of December 8, 1940, having been furnished, without the additional assessments having been introduced in evidence, or otherwise shown to taxpayer, without evidence, without a report in writing setting forth a review of the cause and the essential facts of the matter, and the right of respondents to thus proceed, is challenged by petitioners, who contend before this Court that the State statutes, as construed and applied against them, permitted the arbitrary exercise of power, a departure from the accepted course of judicial proceeding, without due process of law and the equal protection of the law, and said statutes are thus unconstitutional and violate the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi.

Appellants allege and show they have no adequate remedy in the courts of the State of Mississippi; State statutes do not allow recovery of interest, no appropriation has ever been made by the Legislature of Mississippi to pay interest and taxes unlawfully collected but only taxes erroneously

paid, and then only after "proper application," audited by the Auditor of Public Accounts, opinion of the Attorney General that it should be paid, and certificate of the Chairman of the State Tax Commission of Mississippi as to overpayment. Taxpayer alleges, and the demurrer admits, that he is unable to pay the tax; he does not have the money (Section 3276, Code of 1930) (R. 57, 140) (R. 35-40).

B.

Statement of Basis upon Which the Court Has Jurisdiction to Review the Decree in Question.

A final decree has been rendered by the highest court of the State of Mississippi in which a decision could be had, and there is drawn in question the validity of statutes of the State of Mississippi (Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938) on the ground of their being repugnant to the Constitution of the United States, and more particularly the Fourteenth Amendment. Petitioners claim and show that the statutes of the State, as construed and applied against them, and now attempted to be enforced against them, deprive them of due process of law and the equal protection of the law, and claim that this Court has jurisdiction to review the decree of the Supreme Court of Mississippi, pursuant to the provisions of Section 237(b) of the Judicial Code, as amended.

C.

The Questions Presented.

May the state court proceed against taxpayer under Section 6, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, of the General Laws of Mississippi, and permit the collection of additional sales tax for the years

1937 and 1938, alleged to have been made from the "best information available," for the alleged failure of taxpayer to maintain adequate records, when and where taxpayer denied and challenged jurisdiction, without affirmatively showing jurisdiction so to do, and without requiring the officers charged with the duty of enforcing said laws to afford petitioning taxpayer an adequate hearing, at which evidence must be introduced, taxpayer permitted to cross-examine witnesses against him, know the state of case against him, and examine returns and assessments made against him, and without a report in writing setting forth a review of the cause and the essential facts of the matter?

May the State court ignore the reasons given in Registered Letter to taxpayer, by the Commission, its Chairman, and the Excise Commissioner, for making additional sales tax assessments against taxpayer, and permit the Commission, its Chairman, and the Excise Commissioner to resort to other means than shown, and the State court to inferentially say the assessments were made for other reasons that do not appear?

May the State court deny the claim of constitutional right, by holding in this appeal case that its decision in the first appeal case is the law of the case and res judicata where in said first appeal case the State court held it could not consider the claim of lack of evidence to support the administrative order, because on certiorari proceeding it could only consider errors of law arising or appearing on the face of the record?

May the State court purposely evade the decision of the Federal question, to prevent a review by this Court, by resting its decision on grounds not adequate to support it?

May the decision of the State court rest on grounds shown to be without support in the record?

May petitioners attack upon the State statutes, as construed and applied against them, go unanswered, and their

claim that the State statutes as construed and applied against them, are unconstitutional, null and void, and violated the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi, be disposed of by demurrer to sworn Bill of Complaint and exhibits, admitting all of the facts alleged in said bill, factually showing and proving their claim of constitutional right, and by decision of the State court that the decision in the first appeal case is the law of this case and res judicata when the State court held in the first appeal case that it could not and would not pass upon the merits of the case?

May taxpayer's claim of constitutional right, and his challenge of the State statutes, as construed and applied against him, and now attempted to be enforced against him and the sureties on his certiorari bond, as violating the 14th Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi, go unheeded and unanswered when petitioners show that they have no adequate remedy in the State court, the Bill of Complaint alleges taxpayer is unable to pay the tax; he does not have the money, and the demurrer admits the fact, and the Legislature of Mississippi has not appropriated money to pay taxes unlawfully collected, interest on the amount of said taxes, and the law of Mississippi requires taxpayer to file a proper claim, the Auditor of Public Accounts to audit the claim, the Attorney General to be of the opinion that said taxes should be repaid, and the Chairman of the State Commission to certify to overpayment?

May the proviso contained in Section 6, Chapter 113, Laws of 1938, permitting taxpayer to file petition in writing, enjoining on the Commissioner the duty to grant a hearing and investigate that question fully before proceeding further under that section (6), be ignored and violated, and

taxpayer denied the hearing provided by the legislature of Mississippi?

Whether the proceedings against taxpayer, factually detailed in sworn Bill of Complaint, admitted by demurrer, deprive him of Due Process of Law?

Whether the proceedings against taxpayer, factually detailed in sworn Bill of Complaint, admitted by demurrer, deprive him of the equal protection of the law?

Whether the proceedings against petitioners, shown by sworn Bill of Complaint, admitted by Demurrer, deprive them of Due Process of Law and the Equal Protection of the Law?

Whether the proceedings, orders, judgment and decree, against taxpayer and petitioners, were taken and had, made, rendered and entered with jurisdiction of the person and subject-matter, and afford them Due Process of Law and the Equal Protection of the Law, guaranteed by the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi?

Whether the State statutes complained of, as construed and applied against petitioners, by the Commission, its Chairman and the Excise Commissioner of the State Tax Commission of Mississippi, and the State court, afford petitioners Due Process of Law and the Equal Protection of the Law?

D.

Reasons Relied On for the Allowance of the Writ.

1. The State court has decided the Federal question involved in this cause, in a way probably not in accord with applicable decisions of this court.

2. The State court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court and by an inferior,

quasi-judicial tribunal, as to call for an exercise of this Court's power of Supervision.

3. The State court has decided an important question of local law in a way in conflict with applicable local decisions.

4. The State court has decided an important question of general law in a way untenable, and in conflict with the weight of authority.

5. The State court has, in effect, decided a federal question in a way probably in conflict with applicable decisions of this Court.

6. The State court purposely avoided expressly deciding the federal question.

7. The decision of the State court could not have been reached without deciding the federal question.

8. The factual basis of the State court's decision is without support in the record.

9. The effect of the State court decision, if permitted to stand, is to affirm a judgment arbitrarily rendered, without jurisdiction, over the objection of Petitioners, without evidence, and without giving Petitioners an opportunity to be heard in their defense.

10. The State court decided a Federal question of substance, not in accord with applicable decisions of this Court.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Mississippi, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and

entitled on its docket, #35,405, Eddie J. Viator, et al., appellants, *v.* R. C. Edwins, Sheriff, etc., et al., appellees, and that the said decrees of the Supreme Court of Mississippi may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

EDDIE J. VIATOR,
J. J. VIATOR,
J. A. VIATOR,
C. C. MEYERS,
O. MEYERS,
By ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 457

EDDIE J. VIATOR, ET AL.,

Petitioners,

vs.

R. C. EDWINS, SHERIFF, ETC., ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the Supreme Court of Mississippi, in *Viator* v. *State Tax Commission, Et Al.*, is reported in 193 Miss., 266, 5 So. (2d) 487. The opinion of the Supreme Court of Mississippi, in *Viator Et Al.* v. *R. C. Edwins, Sheriff, Etc., Et Al.*, dated June 7, 1943, is not officially reported in the State reports, but may be found in 13 So. (2d) 212-213. The opinions of the Supreme Court of Mississippi appear at R. 166-167 and 168-172. Per Curiam request of the Supreme Court of Mississippi for briefs on the Federal question appears at R. 173-174.

II.

Jurisdiction.

1. Sec. 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, et seq.

2. The date of the decree to be reviewed is June 7, 1943 (R. 166-167). Suggestion of Error was filed in the State court and overruled on July 9, 1943. (R. 129a) Application for Extension of Time within which to apply for Writ of Certiorari was presented to Mr. Justice Hugo L. Black. Order granting an extention of 34 days was signed by Mr. Justice Black on October 6, 1943. Said Order was filed with the Clerk of this Court and will be printed by him with the Petition for Writ of Certiorari and Accompanying Brief.

3. Petitioners launched their attack upon the validity of the State statutes (Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938) as construed and applied against them, by sworn Bill of Complaint (R. 4-68), by Assignment of Errors (R. 115-129), and by Suggestion of Error (R. omitted by Clerk of State Court), filed in the state court, and attack the validity of said statutes, as construed and applied, by Assignment of Errors (R. 130-141) filed in this Court. The Chancery Court of Harrison County, Mississippi sustained demurrer to said Bill (R. 104-105). The State Supreme Court affirmed, holding that the decision of the first appeal case was the law of the case, and res judicata (R. 166-167). The decision of the State Court could not have been reached without deciding the Federal question. The factual basis of the State Court's decision is without support in the record (R. 4-68). The State Court purposely avoided deciding the Federal question to prevent an appeal to this Court and re-

view by certiorari. Petitioners show that taxpayer did not have his day in court, that he was proceeded against arbitrarily, capriciously, without evidence, without jurisdiction, without opportunity to know the state of case against him, without subpoenaes for witnesses in his behalf, without opportunity to cross-examine witnesses against him, without the introduction of any evidence by respondents, without the right to present to a judicial court his claim of constitutional fact, without a report in writing setting forth a review of the cause and the essential facts of the matter required by Section 1, Chapter 150, Laws of 1938, and because without such finding of essential fact his appeals from the additional sales tax assessments against him, first to the Excise Commission, and then to the entire Commission, were a farce, the latter not having heard the case, could not decide it without such report in writing setting forth a review of the cause and the essential facts of the matter. The Field Representatives of the Commission having admitted before the Excise Commissioner that they made the assessments against taxpayer purposely high to take care of whatever they might be able to find, and by comparison, comparing the business of taxpayer for the years 1937 and 1938, because of which the additional assessments are said to have been made, with the business of other merchants in the year 1939, petitioners contend and show that taxpayer was proceeded against arbitrarily, capriciously, and without foundation in fact, and he was denied Due process of Law.

4. Cases believes to sustain the jurisdiction of this Court to review this case on Writ of Certiorari, as required by Rule 12, Paragraph 1, are the following:

Tampa Suburban R. Co., 168 U. S. 583;

American Const. Co. v. *Jacksonville T. & K. W. R. Co.*, 148 U. S. 372-30.

III.

Statement of the Case.

On September 10, 1939, appellees, Commission, its Chairman, etc., demanded $833.00 additional sales tax from Eddie J. Viator, taxpayer. On September 22, 1939, they demanded $1,462.00. On December 8, 1940, they demanded $2,999.98. Taxpayer petitioned in writing for the hearing provided by Section 6, Chapter 113, Laws of 1938. The Commissioner failed and refused to investigate the matter fully; said he would not investigate it fully or at all. Taxpayer introduced witnesses and showed appellees made the assessments purposely high to take care of whatever they might be able to find, and by comparison, comparing the business of taxpayer in the years 1937 and 1938 with that of other merchants in Gulfport in 1939. No subpoenaes were allowed taxpayer for witnesses in his behalf. Appellees failed and refused to introduce any evidence; said they would not introduce any, and said they did not have to introduce evidence. The orders made against taxpayer are contrary to the indisputable character of the evidence introduced by him, showing that he kept adequate records and preserved invoices for a period of two years, that he paid all sales tax due the State of Mississippi, and did not owe any additional sales tax. Appellees refused taxpayer a bill of particulars of their demand, refused to permit his interrogatories to be answered, gave him no opportunity to know the state of the case against him, introduced no witnesses, gave taxpayer no opportunity to cross-examine witnesses, refused to inform taxpayer of the nature of their demand, made and introduced no assessments, gave him no copy of the returns and assessments claimed to have been made against him and which their registered demand said were attached but which were not attached (R. 4-68).

Appellees' registered demand for additional sales tax from taxpayer states the additional assessments are made "from the best information available" and "by reason of the fact that the records kept by him were inadequate to show the amount of tax for which you were heretofore liable under the law." Taxpayer denied he failed to maintain adequate records and failed to preserve his invoices for two years. He denied that the additional sales tax assessments were made from the "best information available." He showed said assessments were made purposely high to take care of whatever appellees might be able to find and by comparing the business of taxpayer in the years 1937 and 1938 with the business of other merchants in the year 1939. Taxpayer showed he kept adequate records and preserved invoices. Appellees made photostat copies of taxpayer's records but did not introduce them in evidence.

The State court ignored the reasons given in the registered notice of the demand for additional sales tax, in which notice appellees claim and state said additional assessments were made from the best information available, and by reason of the fact that the records kept by taxpayer were inadequate to determine the amount of tax for which he was liable. The State court inferentially held the additional assessments were made for reasons other than those stated in the registered demand, and gave the taxpayer no opportunity to know upon what said assessments were based.

When questioned, appellees admitted said additional assessments were made purposely high to take care of whatever they might be able to find and by comparing the business of taxpayer for the years 1937 and 1938, because of which these additional assessments are alleged to have been made, with the business of other merchants in the year 1939.

The State court held it could not consider the evidence or lack of evidence, and whether there was evidence before

the State Tax Commission was not before the Circuit Court of Hinds County and not before the Supreme Court of Mississippi, because on certiorari it could only consider errors of law arising or appearing on the face of the record. Nevertheless, when taxpayer showed the facts by sworn Bill to enjoin the collection of the tax and the judgment of the Circuit Court of Hinds County, affirmed by the Supreme Court of Mississippi, the State court held the former decision was the law of the case and res judicata.

Appellants say the state court purposely avoided deciding the Federal question of want of due process, in order to avoid an appeal to the Supreme Court of the United States. Appellees say the decision of the State court is put upon a basis of fact without support in the record, and that the non-Federal ground is not broad enough to support the decision of the State court.

Appellants contend that taxpayer has not had his day in court. He has been proceeded against without due process of law. Taxpayer was denied a hearing in a constitutional sense. The hearing given him was inadequate, manifestly unfair, and calculated to prevent any court knowing upon what the additional assessments in this appeal case are based, beyond what appellees say that taxpayer owes the tax, and must pay it and then sue to recover it. Appellants say they have no adequate remedy in the State court, taxpayer cannot recover interest on any taxes he may pay, he cannot recover interest without an appropriation by the Legislature; the Legislature has never appropriated interest; the appropriation statutes of Mississippi provide that a proper claim must be filed, it must be audited, the Attorney General must give his opinion that the tax should be repaid taxpayer, and the Chairman of the Commission must certify to overpayment. Taxpayer says that such is not an adequate remedy, and that his claim of constitu-

tional right is not preserved by the State of Mississippi in this case.

Taxpayer claims he was denied the equal protection of the Law. Every decided case in Mississippi, with the exception of that in the first appeal case (*Viator* v. *State Tax Commission*, 316 U. S. 644 and 711) held there was no implied power to tax. Nevertheless, the State Court held in 193 Miss. 266, that the Commission had such power as was given by the Legislature expressly, and by necessary implication. Every decided case in Mississippi, holds that jurisdictional facts must affirmatively appear of record. In the first Viator appeal case, the State court held it was unnecessary for the Commission to show the facts upon which the assessments against taxpayer were based.

The decided cases in Mississippi, with the exception of this appeal case and *Viator* v. *State Tax Commission*, 193 Miss. 266, hold that execution of judgments void for want of jurisdiction, may be enjoined.

Taxpayer did not have the protection of his day in court. He was denied the protection of the General Law. He was not heard before he was condemned.

Page references are shown and the facts more fully set out in Petition for Writ of Certiorari.

Specification of Assigned Errors to Be Urged.

The Assignment of Errors, all of which will be urged, will be found in the record at Pages R. 131 to 141 [1]

The following is a summary of the points upon which appellant's contentions may be grouped:

The challenged Mississippi Statutes, as construed and applied, violate the 14th Amendment to the Constitution of

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[1] Reference to the pages of record are to the unprinted transcript of the record made by the Clerk of the State Court. The certified Transcript of the Record has not yet been printed.

the United States, by permitting the arbitrary exercise of power by State Officers, proceedings without showing of jurisdictional facts, contrary to and beyond the registered notice of the demand for additional sales tax.

The challenged Statutes are void because they were construed and applied, and are now attempted to be enforced without evidence, and without a finding of fact.

The Mississippi Statutes, as construed and applied, are specially arbitrary in taxing appellant, taxpayer, by comparing his business for the years 1937 and 1938, because of which the additional sales tax assessments are claimed to have been made, with the business of other merchants in Gulfport, Mississippi, during the year 1939. Such conclusion is purely arbitrary and the assessments attempted to be enforced against taxpayer and appellants rest wholly upon such arbitrary conclusions, contrary to the indisputable character of the evidence introduced by taxpayer that he did not owe the amount of the additional assessments and that he had paid all sales tax owed by him to the State of Mississippi.

The Mississippi Statutes, as construed and applied, permit appellees, Commission, its Chairman, and the Excise Commissioner, to give notice by registered mail of a demand for additional sales tax from the best information available, based on taxpayer's failure to maintain adequate records and preserve invoices, and yet when taxpayer shows he maintained adequate records and preserved invoices, and such additional assessments were not made from the best information available, to be assessed by the appellees and the State court attempting to say that said additional sales tax assessments are made for other reasons that do not appear of record, and contrary to the reasons given in said registered demand.

The challenged Mississippi Statutes, as construed and applied by appellees and the State Court, deprive taxpayer and appellants of their day in court; they permit proceedings against taxpayer without informing him of the state of case against him, on anonymous informations, not disclosed in the notice by registered demand, and the State court to hold that said additional sales tax assessments may be sustained without a showing of jurisdiction, for reasons that do not appear, without evidence, contrary to the indisputable character of the evidence offered by taxpayer, and without a finding of fact upon which any court may know the reasons for making said assessments, and that they are, in truth and in fact, correct.

The State Statutes cannot be maintained without conceding to the State of Mississippi a corresponding power in other forms of taxation such as income, franchise and ad valorem, the effect of which would be to permit the State to take the property of persons without due process of law, without the equal protection of the law, and to bankrupt any persons subject to the taxing laws of Mississippi, as construed and applied, because, no matter what the amount of the tax demanded, the taxing authorities of the State may require payment, and then force the taxpayer to sue for its recovery.

The effect of the State Statutes, as construed and applied, prevent taxpayer from recovering interest, and before maintaining any suit to file a proper claim, have the same audited by the Auditor of Public Accounts, obtain the opinion of the Attorney General that the tax should be recovered, and further secure a statement of overpayment by the Chairman of the State Tax Commission, when and where the law of Mississippi prohibits the refunding of any taxes without such requirements, and without an appropriation by the Legislature.

Provisions of Challenged 1938 Statutes.

The provisions of the challenged Statutes are set out in full in the Jurisdictional Statement of appellants and further appear in the appendix to this brief.

Section 6 of Chapter 113, Laws of 1938, requires taxpayer to maintain adequate records and preserve invoices for a period of two years. If, and only if, as and when, taxpayer fails to maintain adequate records and preserve invoices, the Commissioner may make additional assessments from the best information available. In order to make a prima facie case against a taxpayer subject to the provisions of the 1938 statute, the Commissioner is further required to give notice by registered mail of demand for said additional sales tax, and furnish copies of his returns and assessments to the taxpayer. It is the returns and assessments that are made prima facie correct and not the demand by registered mail. If a prima facie case is made, by compliance with the Statutes, it is met when taxpayer petitions for a hearing, as, in that event, the Commissioner is required to investigate the matter fully before proceeding further.

The proviso in Section 6, Chapter 113, Laws of 1938 enables and permits taxpayer to petition in writing for a hearing and when such is done, the commissioner is enjoined to investigate the matter fully before proceeding further.

Chapter 150 of the Laws of 1938, copied in the Jurisdictional Statement of appellants, and further shown in the appendix to this brief, permits taxpayer's appeal from the decision of the Chairman of the Commission to be heard by the Excise Commissioner and requires that official to take the testimony of witnesses, take depositions, with power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and make copies of same. At the conclusion of the hearing, the Excise Commissioner is duty bound to submit

all written evidence, documents, records and other pertinent information to the other members of the Commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. The Statute provides that the Excise Commissioner *shall* perform the duties mentioned.

The effect of the Mississippi Statutes, as construed and applied, is not only to additionally assess taxpayer for a large amount of sales tax, over his objection, without affirmatively showing jurisdiction so to do, without evidence, and without a finding of fact, but to place taxpayer in the position of having receipts in excess of $150,000.00, over and above the taxable income previously reported by him, and because of which he could be condemned to pay approximately $84,000.00 of Income Tax to the State and Federal Governments.

This case is appealed to this Court from an adverse decision of the State court affirming the decree of the Chancery Court of Harrison County, Mississippi, sustaining demurrer to the Bill of Complaint filed to enjoin the collection of the additional sales tax assessed against taxpayer for the years 1937 and 1938, which demand eventuated in an adverse decision and judgment in certiorari proceeding instituted by taxpayer, affirmed by the Supreme Court of Mississippi, and appealed to this Court, and dismissed for want of jurisdiction. The facts of the case are detailed in sworn Bill of Complaint, and admitted by demurrer. Nevertheless, the State Court affirmed, holding that the decision in the certiorari case was the law of the case and *res judicata.* As shown in the opinion of the State court in the first appeal case, the State court held it would not consider the lack of evidence to sustain the additional assessments, and pretermitted a decision on the merits of the case. Notwithstanding, the State court held the taxpayer was given an opportunity to overcome by evidence the facts upon which the

assessments were made. The effect of the State court decisions is to hold constitutional the challenged Statutes of Mississippi.

Summary of Argument.

(1) The Registered demand made on taxpayer, copy of which is Exhibit "D" to the Bill of Complaint, shown at pages 79-80 of the Certified Transcript of the Record, is the measure of the jurisdiction against taxpayer to make additional sales tax assessments, for the years 1937 and 1938. Jurisdictional facts must affirmatively appear from the face of the record. Taxpayer denied the jurisdiction. He claimed he kept adequate records and preserved his invoices for a period of two years. Without jurisdiction of the subject-matter, taxpayer is denied Due Process of law, and the Orders and judgment against him are null and void.

(2) Orders of quasi-judicial tribunals, commissions and bodies must be supported by evidence. Unless they are based on evidence, they are unconstitutional, null and void.

(3) Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States.

(4) Attempt by state to measure tax on person's property or income by reference to another's property or income is contrary to due process, and violates the Fourteenth Amendment to the Constitution of the United States.

(5) Where, as in this appeal case, taxpayer has no adequate remedy in the State courts, State statutes do not allow recovery of interest, no appropriation has ever been made by the Legislature of Mississippi to pay interest, the statute does not fix the rate, the State court holds no interest can be paid, and recovery, in any event, is made to depend upon the discretion of the Attorney General and the Chairman of

the State Tax Commission, taxpayer is entitled to enjoin the collection of the challenged tax, particularly where the Federal right asserted cannot be preserved otherwise.

(6) State statute permitting recovery of unconstitutional tax, does not afford adequate remedy where taxpayer is unable to pay the tax because he does not have the money, and the tax collecting officer is unable to respond to judgment.

(7) Where State statutes provide for a hearing, and inadequate and unfair hearings are granted Orders so made are unconstitutional, null and void, and violate the Due Process clause of the Federal constitution.

Argument.

(1) The Registered demand made on taxpayer, copy of which is Exhibit "D" to the Bill of Complaint, shown at pages 79-80 of the Certified Transcript of the Record, is the measure of the jurisdiction against taxpayer to make additional sales tax assessments against him for the years 1937 and 1938. Jurisdictional facts must affirmatively appear from the face of the record. Taxpayer denied the jurisdiction. He claimed he kept adequate records and preserved his invoices for a period of two years. Without jurisdiction of the subject-matter, taxpayer was denied Due Process of law, and the Orders and judgment against him are null and void. The decision of the State court is in conflict with prior Federal and State court decisions.

In *Twining* v. *New Jersey*, 211 U. S. 78, 110, the Court held that Due Process of law requires that the court or commission which assumes to determine the rights of parties shall have jurisdiction.

In *Powell* v. *Alabama*, 287 U. S. 45, 68, this Court held that a legally competent tribunal having jurisdiction of the

case constitutes a basic element of the constitutional requirement of due process of law.

In *Scott* v. *McNeal*, 154 U. S. 34, 46, this Court held that no judgment of a court is due process of law, if rendered without jurisdiction in the Court.

In the case at Bar, taxpayer was proceeded against without jurisdiction. The State court held the Commissioner had other jurisdiction to make additional sales tax assessments than where taxpayer failed to maintain adequate records and preserve invoices for a period of two years. The State court said:

> "The right and duty of the Commissioner to make an additional return or assessment of the taxpayer's sales in addition to that returned by him is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records in Section 6 of the statute is to permit the Commissioner, when the taxpayer's records are inadequate, to determine the correctness of the return made by him 'from the best information available.' "

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this Court said:

> "In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice. Reynolds *v.* Stockton, 140 U. S. 254, 268, 269, 35 L. Ed. 464, 468, 469, 11 Supt. Ct. Rep. 773."

It is well established by a long line of decisions of this Court that a judgment may be impeached for want of jurisdiction.

In *Earle* v. *McVeigh*, 1 Otto (91 U. S.) 503, 23 L. Ed. 398, and *Borden* v. *Fitch*, 15 Johns. (N. Y.) 141, the Court held

that in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction makes it utterly void and unavailable for any purpose.

It has long since been settled by decisions of this Court, that courts cannot go beyond the power delegated to them, and want of jurisdiction may be raised by the parties or by the court itself.

In *John Valley* v. *Northern F. & M. Co.*, 254 U. S. 348; *Elliott* v. *Peirsol*, 1 Pet. 328, and *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U. S. 8, the Court held that such judgments are not merely voidable, but void, and this even prior to reversal.

In Kentucky v. Powers, 201 U. S. 1; *Ex parte Bollman*, 4 Cranch. 75; *United States* v. *Hudson*, 7 Cranch. 32, 33, and *Jones* v. *United States*, 137 U. S. 202, 211, this Court held that courts cannot transcend that jurisdiction.

In *Brown* v. *Keene*, 8 Pet. 112, 115, and *Hanford* v. *Davies*, 163 U. S. 273, 279, the Court held that the record must show affirmatively the fact on which jurisdiction depends. The Court said it is not sufficient that jurisdiction may be inferred argumentatively, from its averments.

The Court held that the facts on which the jurisdiction rests must, in some form, appear on the face of the record.

In *Scott* v. *McNeal*, 154 U. S. 34, and *Old Wayne Mut. L. Asso.* v. *McDonough*, 204 U. S. 8, the Court held that no judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

In *Galpin* v. *Page*, 85 U. S. (19 Wall) 21 L. Ed. 959, the Court said:

> "The facts essential to the exercise of a special jurisdiction must appear in such cases upon the record."

The decision of the state court against appellant, taxpayer, is contrary to every decided case of that court. In addition to the cases cited by appellants, in their brief in opposition to the Motion to Dismiss or Affirm, there are hundreds of others similar in effect.

In *Henderson Molpus Co.* v. *Gammill,* 115 So., at pages 719, 720, 149 Miss. 600, 603, the state court, through Justice Cook, said:

> "It is established by a long line of decisions of this court, that, where a court exercises a special, limited, statutory jurisdiction, nothing is presumed in aid of its jurisdiction, but the record of the proceedings must affirmatively show the existence of every jurisdictional fact necessary to authorize it to act; otherwise its proceedings and judgments are void. Board of Supervisors *v.* Ottley, 146 Miss. 696, 107 So. 753; Smythe *v.* Whitehead, 133 Miss. 184, 97 So. 529; Monroe County *v.* Minga, 127 Miss. 702, 90 So. 443; Robertson *v.* Bank, 115 Miss. 840, 76 So. 689; Henry *v.* Board of Supervisors, 111 Miss. 434, 71 So. 742; Robb *v.* Telegraph Co., 104 Miss. 165, 61 So. 170, 977; Adams *v.* Bank, 103 Miss. 744, 60 So. 770; Hinton *v.* Perry County, 84 Miss. 536, 36 So. 365; Bolivar County *v.* Coleman, 71 Miss. 836, 15 So. 107; Marks *v.* McElroy, 67 Miss. 545, 7 So. 408."

In *Adams, State Revenue Agent,* v. *First Nat. Bank of Greenwood,* 193 Miss. 774, 60 So. 772, the Supreme Court of Mississippi, through Justice Reed, held that a judgment void for want of jurisdiction over the subject-matter, may be enjoined in equity.

In *Ng Fung Ho* v. *White,* 259 U. S. 276, this Court held that the claim that the person to be deported was a citizen, was a denial of an essential jurisdictional fact, and before the Commissioner could proceed he must prove jurisdiction.

2. Orders of quasi-judicial tribunals, commissions and bodies, must be supported by evidence. Unless they are

based on evidence, they are unconstitutional, null and void. The decision of the state court is contrary to prior Federal and state court decisions.

In *Morgan* v. *United States,* 304 U. S. 1, 21, 22, this Court held that requisites of a fair hearing are that the course of proceeding shall be appropriate to the case and just to the party affected; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it.

In *U. S.* v. *Abilene & Southern Ry.,* 265 U. S. 274; and *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio,* 294 U. S. 63, this Court held that nothing can be treated as evidence which is not introduced as such, and a finding without evidence is beyond the power of the commissioner, and violates the Fourteenth Amendment to the Constitution of the United States.

In *Atchison, T. & S. R. Co.* v. *United States,* 295 U. S. 193, 201, 202, this Court held that orders of a quasi-judicial commission must be based on evidence.

In *The Chicago Junction* case, 264 U. S. 258; *Peoria & P. U. R. Co.* v. *United States,* 263 U. S. 528; *I. C. C.* v. *Louisville & N. R. R. Co.,* 227 U. S. 88, and *Lehigh Valley R. Company* v. *United States,* 243 U. S. 412, this Court held that Orders of administrative tribunals, quasi-legislative and quasi-judicial, must be supported by evidence.

In *Florida E. C. R. Co.* v. *United States,* 234 U. S. 167, this Court held that refusal to consider the evidence which was introduced or properly offered for introduction, or to make a material finding without evidence, is arbitrary action, and an order so made must be reviewed by the Courts.

In this appeal case, the state court held the decision of the first appeal case was the law of the case and res judicata. In the first appeal case, entitled *Viator* v. *State Tax Commission of Mississippi, et al.,* 193 Miss. 266, 5 So. (2d) 487, 62 S. Ct. 1109, 62 S. Ct. 1275, the state court held it could not

consider the question of lack of evidence to sustain the administrative order, because on certiorari it could only examine errors of law arising or appearing on the face of the record.

3. Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts, otherwise they are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States. The decision of the state court is in conflict with prior Federal and state court decisions.

In *Atchison, T. & S. R. Co.* v. *United States,* 295 U. S. 193, 201, 202, this Court held that Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts, otherwise they are unconstitutional, null and void, and violate the Due Process clause of the Constitution of the United States.

Section 1, Chapter 150, Laws of Mississippi of 1938, requires the Excise Commissioner to make "* * * a report in writing setting forth a review of the cause and the essential facts of the matter."

Here, the Excise Commissioner heard taxpayer's appeal from the action of the Commissioner (the Chairman of the State Tax Commission) but the former failed to report in writing setting forth a review of the cause and the essential facts of the matter. Instead, he wrote a letter to the Commission, advising, in part, as follows:

> "After (a) full consideration of all evidence and matters presented by the taxpayer, it was the opinion of the Excise Commissioner, and concurred in by the District Supervisor, the Field Auditor and the Attorney for the Commission, that the additional tax should remain as assessed."

Taxpayer's next appeal to the entire Commission, provided by this section (1), above, was an idle ceremony. Not

having heard the testimony of witnesses, and without the required report in writing, setting forth a review of the cause and the essential facts of the matter, there was nothing before the entire Commission upon which to predicate and base the Final Order against taxpayer, dated May 24th, 1940 (R. 74-76). The state court held it was unnecessary for the Commission to again set forth the facts on which the assessment was made. What facts could the Court have had in mind? Certainly not the conclusions of the Excise Commissioner that the assessment should remain as originally assessed—in which conclusions he wrote he was supported by the District Supervisor, the Field Auditor and the Attorney for the Commission. The statute does not require concurrence of any agent of the state, be he District Supervisor, Field Auditor, or Attorney for the Commission. When taxpayer objected to the report of the Excise Commissioner, he was brushed aside, and merely permitted to read his objections. Such objections appear in the record of the first appeal of this cause to this Honorable Court. As the Bill of Complaint charges, there was no evidence to sustain the assessments, either before the Excise Commissioner, or the entire Commission. On the contrary, taxpayer testified at length that he did not owe the tax, and that he maintained adequate records and preserved invoices for a period of two years. In fact his records were examined by appellees, and photostat copies of said records made, but they were not introduced in evidence. Opposed to the testimony of taxpayer, were the statements of the Field representatives of the Commission that they made the assessments purposely high to take care of whatever they might find, and by comparing the business of taxpayer for the years 1937 and 1938, because of which the additional assessments are alleged to have been made, with the business of other merchants in Gulfport in the year

1939. That is positively the extent of the proof against taxpayers, if proof that is.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, it was insisted by the Government that under the Hepburn Act of 1906, 34 Stat. 584, 49 U. S. C. A. Sec. 1, which provides that rates should be set aside if, after hearing, the Commission shall be of the opinion that the charge was unreasonable, an order based on such opinion is conclusive and could not be set aside, even if the finding was wholly without a substantial evidence to support it. That contention was denied in no uncertain terms. The Court said:

> "But the statute gave the right to a full hearing, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitutional condemnation of all arbitrary exercise of power."

Again, in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, supra, it was further insisted by the Government that the Commerce Act, 26 Stat. 743, 49 U. S. C. A. Sec. 12, required the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created (as the State Tax Commission contends in the case at Bar; that it can make additional sales tax assessments from the best information available) and having been given legislative power to

make rates, it could act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. To this contention the Court said:

> "But such a construction would nullify the rights to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The Commission is an administrative body, and, even when it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can a party test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission h-ad been it extraneous, unknown but presumptively sufficient, evidence to support its finding."

The above principle of law was reiterated in *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274. In that case the contention was made that the order of the Interstate Commerce Commission was invalid because it rested upon evidence not legally before the Commission. It was conceded that the finding of the Commission related, in part,

from data taken from the annual reports filed with the Commission by the carriers; that the reports were not put in evidence through excerpts. The Court held that the Order of the Commission was void, for a finding without evidence is beyond the power of the Commission, and nothing can be treated as evidence which is not introduced as such.

In the case at Bar, appellees argued in the Courts below, and will argue here, that it must be presumed that the Commission had the "best information available" before it when the additional sales tax assessments were made against taxpayer, and, since such is a prima facie case, nothing need be introduced or proven. As previously shown, copies of the additional returns and assessments were not attached to the Registered demand for payment; they were not introduced in evidence. In fact they were not even shown to the taxpayer. It is appellants' contention, even if copies of the returns and assessments are attached to the Registered demand, and put in evidence, such prima facie case disappears when taxpayer petitioned for the hearing, for the obvious reason that the statute (Section 6, Chapter 113, Laws of 1938) required, and requires, the Commissioner to investigate the matter fully before proceeding further under the Section.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241, this Court said:

> "We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of viol-ating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority de-

pends on determinations of fact, those determinations must be shown."

As the court said in *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59, 43 S. Ct. 51, 55, 67 L. Ed. 124:

> "In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this."

Referring to the ruling in the *Wichita* Case, the Court said in *Mahler* v. *Eby*, 264 U. S. 32, 44 S. Ct. 283, 288, 68 L. Ed. 549:

> "We held that the order in that case, made after a hearing and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion, not only on the language of the statute, but also on general principles of constitutional government."

If this court, as said in *Panama Refining Co.* v. *Ryan*, supra, did not "* * * regard the President as immune from the application of these constitutional principles", how, then, can appellees, Commission, its Chairman, and the Excise Commissioner, escape the conclusion that such constitutional principles require their Orders to contain the ex-

press findings mentioned in Section 1, Chapter 150, Laws of 1938. It is the "report in writing, setting forth a review of the cause, and the essential facts of the matter," mentioned by the Legislature in the enactment, that prevents the statute from being purely a delegation of legislative power, and affords taxpayer Due Process of law, by requiring appellees, Commission, its Chairman, and the Excise Commissioner, to find in accordance with the facts of the matter. Appellees usurped power never conferred on them. The Commissioner, first, refused taxpayer a hearing in a constitutional sense; said he would not investigate the matter fully, or at all. He failed and refused to inform taxpayer of the state of case against him; failed and refused to introduce evidence, would not permit taxpayer to cross-examine witnesses against him, and sustained his arbitrary assessments for additional sales tax, made on anonymous informations, condemned by the Emperor Trajan in his letters to Pliny, on the purely capricious actions of the Field representatives of the Commission, in making the assessments purposely high to take care of whatever they might be able to find, and by comparing the business of taxpayer, in the years 1937 and 1938, with business done by other merchants in the year 1939. The Excise Commissioner, next, refuse-d to "take the testimony of witnesses, verbally, or in writing, take depositions, * * * require the production of books and other records and papers * * * make copies of same." And "* * * submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter."

Third, and last, the whole commission, mentioned in Section 1, Chapter 150, Laws of 1938, was without constitutional right to render its decision on the appeal. Not having heard the testimony of witnesses, with no evidence

before it, and without a report in writing setting forth a review of the cause and the essential facts of the matter, it was powerless to adjudge liability against taxpayer, and render its decision on such appeal.

Notwithstanding these salient facts, and they are facts: the sworn Bill of Complaint charges them as facts, and the demurrer admits them as such, the state court affirmed, holding it could not consider the lack of evidence, but only errors of law. The state court, in affirming the decree of the learned Chancellor sustaining demurrer to the Bill of Complaint, said the decision in the first appeal case, from an adverse judgment in certiorari proceedings, was the law of the case and res judicata. The court said:

> "The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment."

The state court refused to permit taxpayer to show anything in the former cause, as the opinion of the court clearly and forcibly shows. In the former appeal case, when taxpayer attacked the order against him, because it was made without evidence, and contrary to the indisputable character of the evidence offered by taxpayer, the state court said:

> "Another of the appellant's complaints is that 'there is no presumption in favor of the validity of an order unless there is evidence to support such order.' The order referred to is that made by the Tax Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari, is 'confined to the examination

of questions of law arising or appearing on the face of the record and proceedings.' "

The arbitrary action of appellees, Commission, its Chairman, and the Excise Commissioner, against appellant taxpayer, was not only concurred in by the state court, but will be perpetuated against appellant, taxpayer, and the sureties on his certiorari and appeal bonds, unless this Honorable Court intervenes to do justice and protect them in their constitutional rights.

In *Bratton* v. *Chandler,* 260 U. S. 110, this Court held that a state law establishing a commission for licensing real-estate brokers, where it authorizes the commission to require and procure proof of honesty of each applicant, would be unconstitutional if interpreted to mean that the commission might procure such proof secretly, without giving the applicant notice or opportunity to learn its nature and source and to meet it.

In *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 419, this Court held that any course of procedure which has for its object the taking of property to satisfy an alleged legal obligation and which yet accords no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the Supreme law of the land can hardly be termed "due process of law."

In *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild,* 224 U. S. 510, this court held that the hearing which must precede the taking of property is not a mere form; the owner must have the right to secure and present evidence; he must be given the opportunity by proof and argument to controvert the case asserted against him before a tribunal bound not only to listen but to give legal effect to what has been established.

In *Bratton et al.* v. *Chandler et al.,* 260 U. S. 110, this Court held that a statute regulating and licensing does

not authorize procuring of evidence without opportunity to meet it.

In *Powell* v. *Alabama, supra,* 287 U. S. 45, 68, and *Frank* v. *Mangum,* 237 U. S. 309, 340, the Court held that notice and hearing are preliminary essentials to the passing of an enforceable judgment, and that they, together with a legally competent tribunal, having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. (4) Attempt by state to measure tax on person's property or income by reference to another's property or income is contrary to due process of law, and violates the Fourteenth Amendment to the Constitution of the United States. The decision of the state court is in conflict with prior federal and state court decisions.

In *Hoeper* v. *Tax Commission of Wisconsin et al.,* 284 U. S. 206, 52 S. Ct. 120, this Court, through Mr. Justice Roberts, held the provision of a statute of Wisconsin, for addition of wife's income to husband's in computing husband's tax liability void as denying due process, and that an attempt by a state to measure tax on person's property or income by reference to another's property or income in contrary to due process.

The field representatives of the State Tax Commission of Mississippi, on examination by appellant taxpayer before the Excise Commissioner, admitted they made the assessments against taxpayer purposely high to take care of whatever they might be able to find, and by comparison with the business of other merchants in Gulfport, Mississippi, in the year 1939. Here, then, is an example of a state measuring the tax on appellant taxpayer's income and receipts of business, by reference to another's property and income, and such action is contrary to, and violates, the Fourteenth Amendment. Appellant taxpayer was denied due process of law. The Wisconsin statute

could not be sustained, and appellants respectfully submit the state statutes of Mississippi cannot be sustained. While the Wisconsin statute provided, in express language, for such action of the Tax Commission of Wisconsin, and the court condemned it and reversed the judgment of the state court, the Mississippi statute only provides that the Commissioner may make such additional assessments "from the best information available", without defining "best information". Nevertheless, appellees, Commission, its Chairman, and the Excise Commissioner, and the state court, sustained the tax against appellant on such arbitrary and capricious information and declaration. Such action is at variance with the rudiments of fair play, and the essential requirements of due process. It is far worse than anonymous informations, but no information. Counsel for appellees bodly admitted before the state court that such was done, and he even contended that such could lawfully be done.

(5) Where, as in this appeal case, taxpayer has no adequate remedy in the state courts, state statutes do not allow recovery of interest, no appropriation has ever been made by the Legislature of Mississippi to pay interest, the statute does not fix the rate, the state court holds no interest can be paid, and recovery, in any event, is made to depend upon the discretion of the Attorney General and the Chairman of the State Tax Commission, taxpayer is entitled to enjoin the collection of the challenged tax, particularly where the Federal right asserted cannot be preserved otherwise. The decision of the state court is in conflict with prior Federal and state court decisions.

Appellant, taxpayer, alleges and the demurrer admits, that he cannot pay the tax assessed against him; he does not have the money.

The authorities to sustain this proposition are set forth in appellants' Brief in Opposition to the Motion to Dis-

miss or Affirm, filed in this cause, and in the interest of brevity are not again included here.

Section 3276, Mississippi Code of 1930, copied in the jurisdictional statement of appellants, and in their Bill of Complaint (R. 36, 37, 38), provide that before any refund of taxes can be made the Attorney General must be of the opinion that the claim should be paid, and he must then give his approval. Where, then, is the legal remedy of taxpayer to control the discretion of that official of the state?

EXCEPT FROM LETTER OF ATTORNEY FOR STATE TAX COMMISSION

Under date of November 20, 1943, while this present appeal case was, and is, pending in this court, the Attorney for the State Tax Commission of Mississippi wrote Counsel for appellants, concerning a claim for refund that had been made by him, in part, as follows:

> "I am writing to the District Office for this information; and as soon as I receive same, I shall be in position to advise you positively as to whether or not the refund will be recommended. However, you are doubtless aware of the fact that the actual approval of any refund of taxes rests solely in the discretion of the Attorney General, our only province in the matter being to certify as to the correctness of any application as reflected by the records of this department."

The letter quoted from, above, is copied and whom in the Appendix to this brief.

While this is not an appeal direct from an adverse decision of a three-judge Federal Court, appellants submit that the principles of law announced by this court, through Mr. Chief Justice Stone, in *Matthews* v. *Rodgers*, 284 U. S. 521 52 S. Ct. 217, 76 L. Ed. 447, and *Great Lakes Dredge*

& Dock Co. v. *Huffman*, 63 S. Ct. 1073, the latter recently decided, and citing the *Matthews* v. *Rodgers Case*, are applicable here. If, as the sworn Bill of Complaint charges, and the demurrer admits, appellant taxpayer does not have the money to pay the challenged tax, and the state court holds he must pay the tax and then sue to recover it, his asserted Federal right cannot be preserved without the injunction prayed for in the Bill of Complaint filed in this cause.

(6) State statute permitting recovery of unconstitutional tax, does not afford adequate remedy where taxpayer is unable to pay the tax because he does not have the money, and the tax collecting officer is unable to respond to judgment. The decision of the state court is in conflict with prior Federal and state court decisions.

Matthews v. *Rodgers, supra;*

Great Lakes Dredge & Dock Co. v. *Huffman, supra.*

No money can be paid to satisfy the judgment of any court of Mississippi, against a tax collecting official, or otherwise against the State, in the absence of a Legislative appropriation made for that purpose. No money has ever been appropriated by the Legislature of Mississippi to pay judgments rendered by any court in cases of this kind.

This is settled law in Mississippi, by the decisions of the state court in *State* v. *Cole*, 81 Miss. 174, 32 So. 314, and *Cobert* v. *State*, 86 Miss. 769, 39 So. 65.

The appropriations made by Chapters 78, Laws of 1938, 81, Laws of 1940, and 11, Laws of 1942, copied in appellants' Bill of Complaint, were made to refund taxes "erroneously paid to the state tax commission", not unlawfully assessed and collected by its chairman and thereafter recovered in an action against him. Moreover, there is no authority whatever to recover interest, even on taxes erroneously paid.

Erroneous payment of taxes, by the terms of these appropriation statutes, are to be refunded according to the provisions of Section 3276, Mississippi Code of 1930, as amended by Chapter 260, Laws of 1938, which provides that upon proper application of the claimant, not on the rendition of a judgment, the auditor shall "make a careful investigation of" it, or if he", not a court, "shall find that any taxes or moneys have been" erroneously paid into the treasury of the State, he shall audit it and submit such audited claim to the attorney general for "his", not the court's, "inspection and approval", and if the "attorney general", not the court, "be of the opinion that such claim should be paid he shall approve the same."

The Court's attention is especially invited to the provisions of each of these appropriation bills, to the effect, that no refund shall be made except where the claim is "supported by a certificate of *overpayment*, or *erroneous payment*", not unlawful collection, "issued by the chairman of the state tax commission", not the circuit judge.

The circuit judge has no power to compel the auditor to audit a claim which has been solemnly adjudicated to be correct. If any different result should follow the audit, which would prevail, the audit or the judgment? What if the attorney general disagreed with the circuit judge and the judgment of the circuit court? What if all was harmony until the claim reached the chairman of the state tax commission, and he concluded all were in error, the circuit judge and the attorney general, and, hence, declined to certify to overpayment? The circuit judge and the court has no inherent power to order him to certify to such overpayment, where he does not feel there has been an overpayment. The challenged statutes do not authorize, or require, the circuit court to command the chairman to certify to the judgments of the court.

On the contrary, Section 8, Chapter 113, Laws of 1938,

provides that on receipt of a certified copy of the judgment, the auditor shall issue his warrant and the treasurer shall "pay such judgment out of any funds in the state treasury". But, and here is another pitfall, against what funds shall the warrant be drawn? Out of what shall the judgment be paid?

According to two of the ablest opinions that ever were delivered by the Supreme Court of Mississippi, the taxpayer would recover nothing whatever.

In *State* v. *Cole, supra,* Justice Terrall said:

> "There are in our constitution many provisions that are self-executing, and not requiring legislative action to make them effective; but they are unmistakable from their terms, and manifestly section 212 is not one of this character. It does no more than fix the rate of interest on trust funds held by the state at 6 per cent., and to direct its semiannual distribution, leaving the legislature the carrying into effect of the sovereign will as thus expressed. Who is to make the distribution, and to whom, and out of what funds, and in what manner? The means of payment and all the details are for the legislature to provide. What means has the state for payments, except by taxation? It devolves on the legislature to provide by taxation for the maintenance of the state government in all its departments and the discharge of all its obligations. The state has no means of existence except by the exercise of the sovereign power of taxation. The constitution does not impose any taxes, except the poll tax by section 243, and must be held to have left the discharge of the obligation declared by section 212 to be by the legislature, on which it devolves to provide ways and means for the discharge of all obligations of the state. There is no just ground for the supposition that the framers of the constitution intended to dispense with legislative action as to the payment on trust funds, and to require it as to maintaining the existence of the state government, which cannot

live without money, and cannot get money without legislative action. Not an officer of the state can be paid his salary except with money raised by taxation, and after appropriation therefor by the legislature. The members of the legislature are dependent upon the same provisions for their pay. No money can come into the treasury or go out of it lawfully except as directed by legislative act. Collection and disbursement of public money belonging to the legislature, and must be done as it directs. A state treasurer and an auditor are provided for by section 134 of the constitution, but it was left to legislation to prescribe their duties, and the provisions of the Code of 1880 as to these were continued in force as provided by section 274 of the constitution."

In *Colbert* v. *State, supra,* Justice Cox said:

"But even if it should be conceded that the exercise of the state's option was an executive, rather than a legislative, function, or, this being denied, if it be conceded that the Legislature intended, and in effect commanded, that the Governor exercise the state's option, still, in our judgment, the Governor was without power to order the bonds in question paid, for the simple reason that the legislature had made no appropriation for their payment. Such an order under such circumstances was virtually an executive appropriation of the money required to pay the bonds. The proposition so stated is its own refutation. Legislative control over the treasury, which we recognize as the supreme legislative prerogative, involves the necessity of legislative appropriation in order to the payment of moneys out of the treasury. This is a fundamental law. It is written in express terms or by necessary implication in the constitution of all free states. Clause 7 of section 9 of article 1 of the constitution of the United States declares that 'no money shall be drawn from the treasury but in consequence of appropriations made by law'. The Constitution of Mississippi of 1869 declared that 'no money

shall be drawn from the treasury, except on appropriations made by law'. Vide section 26 of article 4. The Constitution of 1832, art. 7, Section 7, declared that 'no money shall be drawn from the treasury but in consequence of an appropriation made by law', and the same provision in the same language is found in the Constitution of 1817, art. 6, Section 8, under which Mississippi was admitted to the Federal Union. We cannot be persuaded that the omission from the Constitution of 1890 of a similar express provision indicates a purpose upon the part of the great jurists and publicists who framed that instrument to abrogate this essential principle of constitutional government. This fiscal scheme which they provided and ordained negatives the idea. By section 63 of the Constitution it is provided that 'no appropriation shall be passed by the Legislature which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury'. By section 64 it is provided that 'no bill passed after the adoption of this Constitution to make appropriations of money out of the state treasury shall continue in force more than six months after the meeting of the Legislature at its next regular session; nor shall such bill be passed except by the votes of a majority of all the members elected to each house of the Legislature'. Section 68 declares that 'appropriation and revenue bills shall, at regular sessions of the Legislature, have precedence in both houses over all other business, and no such bills shall be passed during the last five days of the session'. Section 69 declares that: 'General appropriation bills shall contain only the appropriations to defray the ordinary expenses of the executive, legislative and judicial departments of the government, to pay interest on state bonds, and to support the common schools. All other appropriations shall be made by separate bills, each embracing but one subject. Legislation shall not be engrafted on appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what

purpose paid'. Section 73 empowers the Governor to veto parts of any appropriation bill and approve parts of the same, and declares that the parts approved shall be law. When we consider all these provisions together, and note the jealous and wise restrictions imposed by the Constitution upon legislative power in the matter of the appropriation of public moneys, we are constrained to believe that the Constitution regards the Legislature as the sole repository of power to make appropriations of moneys to be paid out of the state treasury. We can no more infer the possibility of an appropriation by executive action of moneys for the payment of public debts than we could the levying of taxes by executive action for the same purpose. If the one may be inferred, the other may also; and thus the entire constitutional scheme for Legislative control over the public revenues be subverted."

(7) Where state statutes provide for a hearing, and inadequate and unfair hearings are granted Orders so made are unconstitutional, null and void, and violate the Due Process clause of the Federal constitution. The decision of the state court is in conflict with prior Federal and state court decisions.

Kwock Jan Fat v. *White*, 253 U. S. 454;
Morgan v. *United States*, 304 U. S. 1, 21, 22;
Morgan v. *United States*, 298 U. S. 468;
Interstate Commerce Comm. v. *L. & N. R. R. Co.*, 227 U. S. 88, 91;
Stuart v. *Palmer*, 74 N. Y. 183, 190;
Florida E. C. R. Co. v. *United States*, 234 U. S. 167;
Whitfield v. *Hager*, 222 Fed. 745;
U. S. v. *Abilene & Southern Ry.*, 265 U. S. 274;
West Ohio Gas Co. v. *Public Utilities Comm. of Ohio*, 294 U. S. 63;
Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 201, 202;

The Commissioner, mentioned in Section 6, Chapter 113, Laws of 1938, refused to investigate the matter fully; said he would not investigate it at all. He failed and refused to inform taxpayer of the state of case against him, introduced no evidence, produced no witnesses, and did not give taxpayer an opportunity to cross-examine witnesses against him. Taxpayer testified and introduced evidence, showing conclusively that he made returns and paid all taxes he owed as sales tax for the years 1937 and 1938. The Orders and judgment against taxpayer are contrary to the indisputable character of the evidence introduced by him, and were made without any evidence on the part of appellees, Commission, its Chairman, and the Excise Commissioner. His appeal to the Excise Commissioner, provided by Section 1, Chapter 150, Laws of 1938, availed naught. No witnesses were produced against him, no evidence, documents and other pertinent information, and at the conclusion of the hearing, he, the Excise Commissioner, failed and refused to make a report in writing, setting forth a review of the cause and the essential facts of the matter. Taxpayer's further appeal to the entire Commission was a farce and a sham. The report of the Excise Commissioner was adopted and the assessments sustained without any further showing. The Circuit Court of Hinds County affirmed and rendered judgment on the Order of the Commission of May 24th, 1940. The Supreme Court of Mississippi affirmed the judgment of the Circuit Court, holding it could not, and would not, consider the merits of the case. When taxpayer and the sureties on his certiorari and appeal bond brought forward all of the facts of the case, conclusively showing the arbitrary and capricious action of the Commission, its Chairman, and the Excise Commissioner by sworn Bill of Complaint, the state court held the decision of the first appeal was the law of the case and res judicata. Taxpayer does not now

know what it is all about; he stands convicted without having had his day in Court; without a hearing in a Constitutional sense, without evidence, and contrary to the accepted course of judicial proceeding. He cannot pay the tax and sue for its recovery. He does not have the money. He could not recover interest on his money, if he could pay it, and he could not compel the auditor of public accounts to audit the claim, the attorney general of the state to be of the opinion that his claim should be paid, and the Chairman of the State Tax Commission to certify to overpayment. He, therefore, does not have an adequate remedy in the state court. His business and property will be taken away without due process. Unless this Honorable court takes jurisdiction and decides the case, he will not be secure in his constitutional rights, and his constitutional rights will not be preserved to him.

Excise Tax Statutes Should Be Strictly Construed Against the Taxing Authority, and in Favor of the Taxpayer.

Every decided case in Mississippi sustains this position, excepting only the decision in the two Viator cases. Cases of the state court holding that the excise tax statutes should be construed against the taxing authority, and in favor of the taxpayer, are the following, to mention but a few of the hundreds of cases decided by the State court:

Miller v. *Illinois Cent. R. Co.*, 146 Miss. 422;
State v. *Union Tank Car Co.*, 151 Miss. 797;
Pan American Petroleum Corporation v. *Miller*, 154 Miss. 565;
McKenzie v. *Adams-Banks Lumber Co.*, 157 Miss. 482;
L. H. Canara Furniture Co. v. *Miss. State Tax Comm.*, 160 Miss. 185;
Gully v. *Jackson International Co.*, 165 Miss. 103;
Town of Utica v. *State ex rel. Rice*, 166 Miss. 565.

In *Gully, State Tax Collector* v. *Jackson International Company, supra,* the state court said:

> "The laws are to be strictly construed against the taxing power. The power cannot be implied. All doubts must be resolved in favor of the taxpayer."

In *Town of Utica* v. *State, ex rel, Rice, supra,* the state court said:

> "Tax laws are to be strictly construed against the taxing power. This power cannot be implied, and all doubts must be resolved in favor of the taxpayer."

In *State, ex rel, Rice, Attorney General,* v. *Louisiana Oil Corporation,* 174 Miss. 585, the state court said:

> "Laws imposing excise or privilege taxes are construed favorably to the citizen and are not imposed unless clearly within the provision of such law, nor are they imposed upon a doubtful interpretation or by implication."

In *Railroad Company* v. *Clarke,* 95 Miss. 689, the state court said:

> "Laws imposing privilege taxes are to be liberally construed in favor of the citizen, and courts will not extend the statute imposing such taxes beyond the clear meaning of the language employed."

The sales tax laws of Mississippi are specially declared to be privilege tax laws.

In *State, ex rel Collins, Attorney General,* v. *Grenada Cotton Compress Co.,* 123 Miss. 191, the state court said:

> "The rule is well settled that laws imposing duties or taxes are not to be construed beyond the natural import of the language, and are never to be construed as imposing burdens upon citizens upon doubtful interpretation."

In *Miller* v. *Illinois Central Railroad Company*, 146 Miss. 422, the state court said:

> "Tax laws are to be strictly construed against the taxing power. If the right to tax is not plain, it cannot be implied. Doubts are resolved in favor of the taxpayer. Before one is liable for taxes, he must come within the express provisions of the taxing statute."

In *Pan American Petroleum Company* v. *Miller, State Tax Collector, supra*, the state court said:

> "It is also a well recognized and fundamental rule of statutory construction that tax laws are to be construed in favor of the taxpayer, and the rule of strict construction in favor of the taxpayer prevails. As we understand this rule, the courts will not extend and expand a statute imposing a tax burden, to make it include either subjects or persons not within the terms of the statute. The laws imposing privelege taxes are to be construed favorably to the citizen, and no occupation is to be taxed unless clearly within the provisions of such law."

Appellants could go on and on, citing and quoting state cases, but such would only extend this brief to undue length. Suffice it to say, the decision against appellant, taxpayer, is the first in the history of the state where the state court held the power to tax could be implied.

In the first appeal case against appellant, taxpayer, the state court said:

> "The Chairman of the State Tax Commission possesses only such powers as are conferred on him by statute expressly *or by implication.* * * *".

Appellant, taxpayer, and petitioner in the Petition for Certiorari filed herein, was thus denied the equal protection of the law. To the same effect is the holding of the

state court against taxpayer in the former appeal case, the judgment of which is now said by the state court to be the law of this case and res judicata, wherein the state court sustains the jurisdiction of appellees, Commission, its Chairman, and the Excise Commissioner. Every other decided case in Mississippi, as heretofore shown holds to the contrary. The court has always held that jurisdictional facts must be shown and they must appear of record. Appellant, taxpayer, was thus, again, denied the equal protection of the law.

Summary and Conclusion.

It is respectfully submitted that the preceding argument fully supports, and indeed requires, the following conclusion:

First: The state court has decided a Federal question of substance contrary to decisions of this Court, and contrary to the general law.

Second: The state court has denied appellants and petitioners due process of law and the equal protection of the law.

Third: The challenged statutes, as construed and applied, are unconstitutional, null and void.

Fourth: Appellants, petitioners, and more particularly taxpayer, were proceeded against without jurisdiction, without evidence, without an opportunity to know the state of case against him, and cross-examine witnesses against him, without a report in writing setting forth a review of the cause and the essential facts of the matter, and were denied due process of law and the equal protection of the law.

On these grounds it is respectfully submitted that the judgment below should be reversed and the Mississippi statutes of 1938 should be declared invalid and their en-

forcement against appellants, petitioners, permanently enjoined.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the decree appealed from the Supreme Court of Mississippi to this Court may be reversed, and the case decided in favor of petitioners, or that the Decree appealed from may be reversed and the case remanded to the state court with directions to proceed in accordance with the opinion and decision of this Court, to the end that petitioners may be secure in their constitutional right, may have their day in court, be proceeded against in accordance with the general law, the accepted course of judicial proceeding, and be advised of the state of case against them, by the introduction of evidence, an affirmative showing of jurisdiction, a finding of essential fact, and a judgment according to law and justice, and that petitioners may be granted due process of law and the equal protection of the law, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Mississippi, and finally reverse it.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners.

APPENDIX.

STATE TAX COMMISSION

A. H. Stone, Chairman
J. E. Davis, Excise Commissioner
M. C. Young, Ad Valorem Commissioner

Jackson, Mississippi

November 20, 1943.

Hon. Albert Sidney Johnston, Jr.,
Attorney at Law,
Biloxi, Mississippi.

Dear Mr. Johnston:

In re: Robert P. Gaude, t/a Brown Derby Bar, Biloxi, Miss.
v. A. H. Stone, Chairman, et al.

Your letter of November 15, addressed to the attention of Mr. Stone, in the absence of Mr. Stone from the office, has been referred to me for reply. I understand the nature of your letter to be an application for refund of the sum of $138.49 paid by the above named taxpayer as additional sales tax demanded, based upon an audit made by Mr. W. R. Smith, a field man connected with the Gulfport District Office.

I assume, of course, that the correct procedure was followed in demanding this tax. But in order that I may intelligently answer your letter, indicating the action of this department with reference to whether or not a refund will be recommended, it will be necessary for us to have full information from the District Office concerning this demand and collection.

I am writing to the District Office for this information; and as soon as I receive same, I shall be in position to advise you positively as to whether or not the refund will be recommended. *However, you are doubtless aware of the fact that the actual approval of any refund of taxes rests solely in the discretion of the Attorney General, our only province in the matter being to certify as to the cor-*

rectness of any application as reflected by the records of this department. (*Emphasis* supplied.)

Very truly yours,

(Signed) J. H. SUMRALL,
Attorney, State Tax Commission.

CC: Mr. R. M. Hill,
District Supervisor,
Gulfport, Mississippi.

Section 6, Chapter 113, Laws of 1938. Be it enacted, that Section 8 of chapter 119, laws of 1934, as amended by chapter 158, laws of 1936, be and the same is hereby amended so as to read as follows:

Taxpayer must keep records—failure to make returns—duty and power of commissioner.

Section 8. It shall be the duty of every person engaging or continuing, in this state, in any business for which a privilege tax is imposed by this act to keep and preserve adequate records of the gross income, gross receipts or gross proceeds of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this act, which said records shall be adequate in substance rather than form, to conform to the requirements and regulations promulgated by the commissioner; and all of such records shall be written in the English language. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased for resale, and all such books, invoices and other records shall be open for examination at any time, by the commissioner or his duly authorized agent.

The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep such records shall subject the person so failing to all the penalties of this act.

If adequate records of the gross income, gross receipts or gross proceeds of sales are not maintained or invoices preserved as provided herein, the commissioner may make additional returns and assessments from the best infor-

mation available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct for the purpose of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if such tax be paid within ten days after notice by the commissioner, then there shall be added ten per centum as damages and interest at the rate of one per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the commissioner, there may be added twenty five per cent for the first offense and fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section.

Section 8, Chapter 113, Laws of 1938. Be it enacted, that Section 10 of chapter 119, laws of 1934, be and the same is hereby amended so as to read as follows:

Aggrieved person may file petition.

Section 10. If any person having made a return and paid taxes thereon feels aggrieved by the additional assessment made upon him for any year by the commissioner, he may apply to the tax commission by petition, in writing, within ten days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The tax commission shall promptly consider such petition, and shall grant such hearing, notifying the petitioner of the time and place fixed for such hearing. After such hearing, the tax commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly

charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to cover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Either party to such suit shall have the right to appeal to the supreme court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. The provisions of section 420, code of 1930, shall not apply to taxes imposed by this act.

Section 1, Chapter 150, Laws of 1938. The governor shall designate the other associate commissioner as "excise commissioner", who shall be selected from the state at large, and who shall preferably, though not necessarily, be an attorney at law.

It shall be the duty of the excise commissioner to familiarize himself with the laws imposing income, sales and other taxes administered by the chairman of the commission. He shall have charge of all appeals from decisions of the chairman to the entire commission, shall arrange the time and place of hearing such appeals, and shall provide for the preparation and presentation to the commission of all evidence, documents, and other matters necessary and proper for a decision on the matters and questions involved

in the appeal. The excise commissioner shall, when necessary, direct and supervise the preparation of any record to be filed in any court of the state. When directed by the other members of the commission, and agreed to by the appealing taxpayers, he may hold a hearing on any appeal from a decision of the chairman at the time and place agreed to, and at such hearing shall take the testimony of witnesses, verbally, or in writing, take depositions, and shall have the power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and he shall have authority to make copies of same. At the conclusion of the hearing, the excise commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. Whereupon the whole commission, if the appealing taxpayer assents thereto, shall render its decision on the appeal; but if the taxpayer desires a further hearing on the cause, the whole commission shall hear the appeal at its office in the capitol.

Chapter 78. House Bill No. 94.

AN ACT making an appropriation for the purpose of refunding income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and light wine and beer taxes, which may be erroneously collected and paid into the state treasury by the state tax commission during the fiscal years 1938 and 1939.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the following sum, or so much thereof as may be necessary, be and the same is hereby appropriated, out of any money in the state treasury not otherwise appropriated, to carry out the provisions of the several laws of the state imposing the taxes hereinafter enumerated, in connection with section 3276 of the Mississippi code of 1930, providing for the refunding of income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and taxes on light wines and beer, erroneously paid to the state tax commission and paid into the

state treasury, for the fiscal years 1938 and 1938, beginning July 1, 1938, and ending June 30, 1940.....$50,000.00

Section 2. That the refund of any such taxes erroneously paid, shall be made by the state treasurer out of any money in the state treasury not otherwise appropriated, upon warrants issued by the auditor of public accounts, which warrants shall be issued in accordance with the provisions of section 3276 of the Mississippi code of 1930, and the claims filed with the auditor of public accounts under the provisions of said section 3276 shall, in each instance, be supported by a certificate of Over-payment, or erroneous payment, issued by the chairman of the state tax commission.

Section 3. That this act take effect and be in force from and after its passage.

Approved January 25, 1938.

Chapter 81, House Bill No. 933.

AN ACT making an appropriation for the purpose of refunding income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and light wine and beer taxes, which may be erroneously collected and paid into the state treasury by the state tax commission during the fiscal years 1940 and 1941.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the following sum, or so much thereof as may be necessary, be and the same is hereby appropriated, out of any money in the state treasury not otherwise appropriated, to carry out the provisions of the several laws of the state imposing the taxes hereinafter enumerated, in connection with section 3276 of the Mississippi code of 1930, providing for the refunding of income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and taxes on light wines and beer, erroneously paid to the state tax commission and paid into the state treasury, for the fiscal years 1940 and 1941, beginning July 1, 1940, and ending June 30, 1942..$50,000.00

Section 2. That the refund of any such taxes erroneously paid, shall be made by the state treasurer out of any money

in the state treasury not otherwise appropriated, upon warrants issued by the auditor of public accounts, which warrant shall be issued in accordance with the provisions of section 3276 of the Mississippi code of 1930, and the claims filed with the auditor of public accounts under the provisions of said section 3276 shall, in each instance, be supported by a certificate of over-payment, or erroneous payment, issued by the chairman of the state tax commission.

Section 3. That this act take effect and be in force from and after its passage.

Approved April 26, 1940.

Chapter 11, House Bill No. 603.

An ACT making an appropriation for the purpose of refunding income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and light wine and beer taxes, which may be erroneously collected and paid into the state treasury by the state tax commission during the fiscal years 1942 and 1943.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the following sum, or so much thereof as may be necessary, be and the same is hereby appropriated, out of any money in the state treasury not otherwise appropriated, to carry out the provisions of the several laws of the state imposing the taxes hereinafter enumerated, in connection with section 3276 of the Mississippi code of 1930, providing for the refunding of income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and taxes on light wines and beer, erroneously paid to the state tax commission and paid into the state treasury, for the fiscal years 1942 and 1943, beginning July 1, 1942, and ending June 30, 1944: $50,000.00

Section 2. That the refund of any such taxes erroneously paid, shall be made by the state treasurer out of any money in the state treasury not otherwise appropriated, upon warrants issued by the auditor of public accounts, which warrant shall be issued in accordance with the provisions of section 3276 of the Mississippi code of 1930, and the

claims filed with the auditor of public accounts under the provisions of said section 3276 shall, in each instance, be supported by a certificate of over-payment, or erroneous payment, issued by the chairman of the state tax commission.

Section 3. That this act take effect and be in force from and after its passage.

Approved March 3, 1942.

MISSISSIPPI CODE 1930

3276. Taxes erroneously paid refunded.—If any person, firm or corporation has paid or shall hereafter pay to the auditor of public accounts or to any tax collector, through error or otherwise whether paid under protest or not, any ad valorem, privilege or excise taxes for which such person, firm or corporation was not liable, or if any such taxpayer has paid any such tax in excess of the sum for which he or it was liable, and any such erroneous payment or overpayment has been paid into the proper treasury, then, in any such event, the auditor of public accounts is hereby authorized and required, upon proper application of any such claimant, to make a careful investigation of all such claims, or, if he shall find that any taxes or moneys have been, or may hereafter be, erroneously paid into the treasury of the state, county, or levee boards, for the purchase or redemption of lands erroneously sold for taxes heretofore or hereafter by any tax collector, he shall audit such claims against each separate fund in proportion to the amount paid over to such fund in each case, and he shall submit such audited claim with the voucher and evidence on which such claim is based, to the attorney-general for his inspection and approval, and if the attorney-general be of the opinion that such claims should be paid he shall approve the same, and the auditor shall thereupon file such voucher and other papers necessary in each case, in his office, as a voucher, and issue his warrant on the state treasury in favor of the claimant for the amount of purchase-money or taxes erroneously paid into the state treasury, and the auditor shall audit the amount of taxes paid the county and levee boards, as the case may

be, and shall certify the amounts found to be due to the clerk of the board of supervisors and secretary of the levee board, and the said board of supervisors, or levee board, shall cause the warrant to be issued on the treasurer of the county, or levee board, in favor of the claimant as certified by the auditor of public accounts, as the case may be, and the county depository, or the treasurer of the levee board, is hereby directed, authorized and required to pay such claims; provided, that it shall not be necessary in order to authorize such refund that the taxpayment was made under protest or because of coercive measures taken on the part of the collecting officers. Provided, however, that nothing in this section shall be so construed as to authorize the recovery or repayment of any tax heretofore levied and collected by any special road district, drainage district, or separate school district, on account of, or upon the ground that the law authorizing such tax was unconstitutional, whether the unconstitutionality of such tax be based upon the creation or mode of operation of any special road district, drainage district or separate school district. Provided further, that nothing in this section shall be construed as authorizing the refunding of state taxes paid into the state treasury through error, or otherwise, without an appropriation first being made to pay such refund or refunds.

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